No. 93-521

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JOINT RESPONDENTS IN SUPPORT OF REQUEST FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

The Association for Local Telecommunications Services ("ALTS") is a non-profit national trade organization representing the competitive access industry. ALTS' members include over 25 competitive access providers ("CAPS") operating as non-dominant carriers, which deploy independently financed networks using state-of-the-art technologies to serve the needs of interexchange carriers (IXCs) and users in over 45 metropolitan areas across the country.

The Competitive Telecommunications Association ("CompTel") is a trade association of approximately 120 common carriers providing domestic and international long distance telecommunications services, and their suppliers. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Sprint Communications Company L.P. ("Sprint") is a limited partnership organized for the purpose of engaging in the provision of domestic and foreign telecommunications. Sprint is wholly owned by subsidiaries of Sprint Corporation (formerly United Telecommunications, Inc.), a publicly traded corporation.

The following affiliates of Sprint have issued shares or debt securities to the public: Carolina Telephone and Telegraph Company, United Telephone Company of Florida, United Telephone Company of Ohio, United Telephone Company of the Southwest, and United Telephone Company of Pennsylvania. Sprint Corporation recently merged with Centel Corporation, formerly a publicly traded corporation.

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The Association for Local Telecommunications Services, the Competitive Telecommunications Association, and Sprint Communications Company, L.P. (herein "Joint Respondents") respectfully suggest that Petitioners' prayer that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case be granted. The Joint Respondents adopt the statement of jurisdiction, statement of the case, and question presented, contained in Petitioners' brief.[1]

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[1] MCI Telecommunications Corp. petitioned for a writ of certiorari (No. 92-1684) for the same underlying Court of Appeals decision as is involved in this case. Although the Joint Respondents do not formally reply to MCI's Petition, they would, of course, support the grant of certiorari sought by MCI since the same Court

REASONS FOR GRANTING THE WRIT

1. There is no real question as to either the importance or soundness of the Federal Communications Commission's "permissive detariffing" rules.

a. For several decades now the FCC has relied increasingly upon competition as a means of fulfilling its statutory obligation to regulate AT&T's rates and services consistent with the public interest. The FCC reasoned that competition would be a better and more efficient "regulator" of AT&T's behavior than directly imposed governmental controls. See *Policy and Rules Concerning Rates for Competitive Common Carrier Services ("Competitive Carrier"), Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 455-56 (1981).

Reliance upon competition was increased with the breakup of AT&T in 1984. AT&T was required to divest its "local bottleneck facilities" so that it could not discriminate against its interexchange competitors in the provision of "access" services; that is, use of the local plant needed to originate or terminate long distance calls. Although the "local bottleneck" remains virtually intact, facilities-based providers are now emerging to compete for the carriage of access traffic and such competition has been encouraged by the FCC.[2]

The FCC regards permissive detariffing as having "played a major role in the rapid development of competition" (Pet. App. 56a, 59a). It has relied upon permissive detariffing and the relaxation of other filing requirements to ease entry and exit and to thereby encour-

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of Appeals decision is involved. The "Pet. App." references cited herein refer to the Appendices attached to the Petition for Writ of Certiorari filed by MCI.

[2] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 Phase I, *Second Report and Order and Third Notice of Proposed Rulemaking* (FCC 93-379, released September 2, 1993), mimeo at 3.

age nascent competitors to risk entering both the interexchange and access facility markets. In its decision below, the FCC "conclude[d]" that

> . . . permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices.
>
> * * * *
>
> . . . we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of service, type of services, and selection of carriers. To adopt a different course of action at this time would only frustrate the success of our current policy (Pet. App. 29a-30a) (*footnote omitted*).

b. The soundness of the FCC's permissive detariffing policy is basically unchallenged. Under well-established economic principles, there is no real danger: (1) that carriers without market power could charge excessive prices or collect "monopoly rents;" (2) that these carriers would have any real incentive to engage in unlawful discrimination or otherwise violate Sections 201 and 202 of the Act; or (3) that they would be able to adopt predation as a realistic market strategy. Given these circumstances, it is apparent that continuation of a requirement that carriers without market power must continue to file tariffs would, as a policy matter, serve no real need.

On the contrary, such a requirement would likely make matters considerably worse. In addition to imposing useless legal and administrative compliance costs, insistence upon a policy that carriers must file tariffs whether or not they possess market power would interfere with economic efficiency by distorting the workings of an emerging competitive marketplace and these distortions might well impede the progress of competition itself. In order to avoid

such consequences, the FCC was understandably anxious to limit, and where possible eliminate, unnecessary tariff and other regulation of carriers without market power.

In a Motion filed with the FCC on September 22, 1993, AT&T agreed with the view expressed by the FCC regarding the futility of imposing tariffs or other regulatory constraints on carriers without market power. AT&T noted that "direct economic regulation" for carriers such as "advance tariff review procedures and other constraints" unnecessarily "impedes the 'dynamism' of a competitive market and impose[s] both direct and indirect costs on users' " (Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed September 22, 1993 in *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* CC Docket No. 79-252 (*"Competitive Carrier"*) at 16-17, citing *Competition in the Interstate Interexchange Marketplace,* 6 FCC Rcd 5880, 5895 (1991).

It was perhaps in recognition of these same concerns that the D.C. Circuit made clear in *AT&T v. FCC,* 978 F.2d 727 (1992), *cert. denied,* 113 S.Ct. 3020 (June 21, 1993) (No. 92-1684) (Pet. App. 37a-56a), that it understood and ". . . did not quarrel with the Commission's policy objectives" in adopting forbearance (Pet. App. 54a). Rather, the problem was the Court of Appeals' belief that permissive forbearance was forbidden to the FCC by the terms of its enabling statute.

2. The Court of Appeals reasoned that the requirement in Section 203(a) of the Communications Act that common carriers "shall . . . file . . . schedules showing all charges . . . for interstate and foreign . . . communication . . ." was clearly obligatory and that the FCC could not read its enabling statute to excuse carriers from filing tariffs under any circumstances. The Court found that the "modification" power contained in Section 203(b)(2)

of the Act[3] was insufficient to permit ". . . wholesale abandonment or elimination" of the requirement in Section 203 of the Act that service be provided pursuant to tariffs (Pet. App. 53a, citing *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985)).

As Petitioners point out, the Court of Appeals' reading of the term "modify" to limit the FCC's authority to "circumscribed alterations" or to "changes in incidental or subordinate features" is simply too narrow. Apart from the fact that Webster's New Collegiate Dictionary and Black's Law Dictionary suggest a broader definition (Petition at p. 10), it would seem clear as a matter of ordinary usage that "modify" has virtually the same meaning as "change" or "alter." Modifications, alterations, changes, etc., may be small or moderate, or may be severe, marked or dramatic. The word "modify" does not by itself either define or limit the seriousness of the modification.

It may be true that "modify" would not ordinarily mean "eliminate." However, the FCC's permissive detariffing policy did not eliminate tariff regulation under Section 203 of the Act. It only excused carriers without market power from the requirement to file certain (*viz.*, domestic) tariffs. Most long distance traffic (AT&T as a dominant carrier still carries over 60 percent of this traffic), almost all access traffic and all international traffic is still carried, and is still required to be carried, pursuant to FCC tariffs. Certainly, in this sense, the FCC's permissive detariffing policy can reasonably be viewed as a modification, rather than as a "wholesale

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[3] Section 203(b)(2) states that

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

abandonment or elimination of a requirement." That the FCC may permit *some* traffic to be provided on a non-tariff basis is strongly suggested by Section 203 itself, which provides in paragraph (c) that

> No carrier, *unless otherwise provided by or under authority of this Act*, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act.

Accordingly, the statute may reasonably be read to permit the FCC's policy of permissive detariffing. It was therefore plainly impermissible for the Court to substitute its own reading of the FCC's enabling statute for that adopted by the agency itself (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 839 (1984)) and to thereby strike down an agency policy of unquestioned soundness and central to the agency's goal of promoting competition.

3. The Court of Appeals also found that its decision was "somewhat buttressed" by the Supreme Court's decision in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Court of Appeals stated that in *Maislin*, the Supreme Court had "rejected the ICC's 'deregulatory' interpretation of the quite similar rate filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762 (1988), which share a common ancestor with the Communications Act, the original Interstate Commerce Act" (Pet. App. 53a). The two statutes—the Communications Act and the present ICA—do indeed share a common ancestor and in many instances provisions of the two statutes remain almost identical. However, this is not universally the case and the use of either statute for comparative purposes "must be approached with considerable caution" (*Competitive Carrier Further Notice of Proposed Rulemaking*, 84 FCC 2d at 467). See also, *Sea-land Service Inc. v. ICC*, 738 F.2d 1311, 1318 n. 11 (D.C. Cir. 1984); *General Telephone of the*

Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971); and *AT&T v. FCC*, 503 F.2d 612, 617 (2nd Cir. 1974).

In enacting the Communications Act, Congress, while content to copy most of the language in Section 203 directly from Section 6(3) of the ICA, declined to do so in the case of Section 203(b)(2). Thus, instead of limiting the FCC's modification authority to "publishing, posting, and filing of tariffs," Congress opted for new language which gave the FCC the unlimited right to "modify" all requirements of Section 203.[4] Obviously, Congress, in enacting the Communications Act, was aware of the ICA language and knew how to copy that language. The conclusion is therefore inescapable that Congress specifically intended the FCC's power to modify Section 203 to be substantially greater than the modification powers originally possessed by the ICC under Section 6(3).

In 1978, Congress restructured the ICC's tariff authority in Sections 10761-2. At this point, Congress could have modeled the ICC's modification powers on Section 203(b)(2). Once again, Congress deliberately chose not to do so and left the ICC with far less modification power than was granted the FCC. For example, Section 10762(d)(1) of the ICA does not give the ICC authority to modify its tariff provisions by "general order" and, unlike Section 203(b)(2), reads, more or less, like a "waiver provision."

Second, *Maislin* did not involve the question of detariffing. Rather, *Maislin* was basically an affirmation by the Court of a well-established regulatory policy known as the "filed rate doctrine."

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[4] The unlimited modification power granted the FCC was examined and curtailed by Congress in 1976, but only in one respect—the FCC could not extend the notice period for filing tariffs beyond the notice period specified in Section 203 (now 120 days). Congress had the opportunity—but declined—to limit section 203(b)(2) in any other way.

The Commission's permissive detariffing policy does not involve, and is in no way at odds with, the "filed rate doctrine." The "filed rate doctrine" is, by its terms, limited to a situation in which there is a "filed rate" and where the common carrier charges a shipper or other customer a rate which is different from that "filed rate." Permissive detariffing is something else. Permissive detariffing involves a situation where an agency grants certain carriers—in this case carriers without market power —the right to forbear from filing tariffis at all. Where a carrier chooses under permissive detariffing not to file tariffs at all, it is axiomatic that there can be no inconsistency with the "filed rate doctrine": because there is no "filed rate," by definition there can be no divergence between a "filed rate" and the rate the carrier is actually charging.

4. The fact that Congress did, in fact, intend to grant the Commission broad flexibility in enforcing Section 203(a) of the Act is shown by the passage of the Telephone Operator Consumer Services Improvement Act ("TOCSIA") of 1990 and the concomitant amendment of the Communications Act in accordance with this legislation. The TOCSIA legislation required that a particular group of carriers without market power—operator service providers ("OSPs")—file 'informational tariffs" whose requirements were generally less stringent than those found in Section 203(a) (see Section 226(h)(1)(a) and (b)). Clearly, in adopting new provisions for "informational tariffs" Congress did not intend to duplicate tariff filing requirements which were already contained in Section 203(a). Presumably, Congress adopted the new provisions in Section 226 of the Act because OSPs would not otherwise have had to file any tariffs at all. To find that Section 203(a) must be applied to all carriers without market power is therefore to read the new TOCSIA provisions on "informational tariffs" out of the Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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